IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

CHARLES DIMICK,	)	
	)	
Appellant,	)	
	)	S.C. CASE 25828
vs.	)	D.C. CASE D 154544
	)	
CLAUDETTE HARRIS DIMICK,	)	
	)	
Respondent.	)	

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES TO CHARLES AS THE "PREVAILING PARTY" REGARDING THE VALIDITY OF THE PREMARITAL AGREEMENT.

II. WHETHER THE DISTRICT COURT ERRED IN ORDERING CHARLES TO PAY THE SPOUSAL SUPPORT DUE UNDER THE PREMARITAL AGREEMENT DURING THE PENDENCY OF THE CASE, AND TO PAY IT AGAIN AFTER THE CASE WAS OVER.

III. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT CLAUDETTE HAD ANY INTEREST IN THE FORT APACHE PROPERTY FOR WHICH SHE OBTAINED A MONEY JUDGMENT UPON DIVORCE.

IV. WHETHER THE DISTRICT COURT ERRED IN FAILING TO RESTORE CHARLES' SEPARATE PROPERTY TO HIM, AND IN FAILING TO EXPLAIN ITS DISPROPORTIONATE AWARD OF COMMUNITY PROPERTY.

STATEMENT OF THE CASE

Respondent's Answering Brief does not have a proposed Statement of the Case, per se, but just an "introduction" that appears to mix procedure, facts, law, and a little argument (e.g., that particular arguments in the Opening Brief are "frivolous.")

Accordingly, Appellant requests that this Court refer to the Statement of the Case in his Opening Brief.

STATEMENT OF FACTS

Again, Respondent has not submitted an alternative Statement of Facts, so it is presumed that the recitation of facts in the Opening Brief is accepted as to accuracy and completeness.

While Respondent has not submitted a formal proposed Statement of Facts, she does attempt to make factual assertions in her "Introduction." Those factual recitations are largely composed of argument, and contain contentious terms that are not part of the record, such as "frivolous." RAB at 1. The Introduction, while perhaps good trial argument, is not descriptive of the facts below pertaining to the issues before this Court, and except for a single citation to the Record is just counsel's recollection of, and commentary on, the evidence in the trial court.

The only point appearing to require direct commentary is Claudette's assertion that "the total amount in dispute, exclusive of attorney's fees, does not exceed $20,000.00." RAB at 1. First, it should be noted that attorney's fees are directly in issue under the Premarital Agreement, and that the sum at stake may well be at least as large as the rest of the underlying judgment.[1] Second, even if Claudette was correct in asserting that Charles' damages did not exceed $20,000.00, that sum (at least for most people) is neither trifling nor frivolous, as a matter of law or of fact.

Accordingly, Appellant requests that this Court refer to the Statement of Facts in his Opening Brief in deciding this appeal.

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[1] The only accounting of the precise sum in the record was Charles' testimony that he paid $5,720.00 specifically to obtain a ruling that the premarital agreement was valid. 4 ROA 870; 2 ROA 290. The Court should note, however, that the case took a year and a half to litigate, and there were multiple hearings, considerable discovery, and a contested trial. The sum of fees "relating to said action" and thus at issue is considerable, even before considering the cost of this appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO AWARD ATTORNEY'S FEES TO CHARLES AS THE "PREVAILING PARTY" REGARDING THE VALIDITY OF THE PREMARITAL AGREEMENT.

As a preliminary matter, Claudette cites a single 20-year old case for the proposition that the lower court's property award (and, presumably, its attorney's fee decisions) will only be reversed for "abuse of discretion." RAB at 3; see Johnson v. Johnson, 89 Nev. 244, 510 P.2d 625 (1973). That case does not stand for the proposition stated by Claudette, however, but only states that under the facts of that case, the trial court had not abused its discretion in choosing between two equally valid analyses. Id., 89 Nev. at 247.

Over the course of the past twenty years, this Court has refined the oblique implication relied upon by Claudette. Recently, in Litz v. Bennum, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 4, Jan. 24, 1995), this Court reversed and remanded, noting the "broad discretionary powers" of the district courts as to custody determinations, but noting that even in that traditionally deferential area, this Court "must be satisfied that appropriate reasoning supported the trial court's decision."

Nothing in Johnson, or in the cases since, indicates that this Court will ignore legal error by the trial court. Rather, as pointed out in the Opening Brief, this Court has maintained that it will review premarital agreements de novo, and thus determine for itself what rights flow from those agreements. See, e.g., Sogg v. Nevada State Bank, 108 Nev. 308, 832 P.2d 781 (1992). Unless this Court's review of the premarital agreement reveals a matter as to which the district court could properly exercise discretion, the question before this Court is not whether the court below abused that discretion, but whether the court below erred in its construction of the premarital agreement by failing to find that Charles was entitled to attorney's fees as a matter of contract.

A. The Premarital Agreement was Valid

Claudette does not directly refute Charles' assertion that the premarital agreement was valid, but instead attempts to recharacterize the inquiry to be performed. Presumably, this point is agreed.

B. Claudette Challenged the Validity of the Agreement, and Charles Defended its Validity

Claudette asserts that she must be considered the "prevailing party on the issue of the Premarital Contract" because she convinced the court below that the Fort Apache property was marital property, because she obtained spousal support, and because the court below ordered Charles to pay the parties' income taxes. RAB at 4.

Of course, the findings Claudette relies upon are challenged in this appeal, and presumably even Claudette would agree that if this Court reverses on those points, her claim to be the "prevailing party" must fail.

That inquiry is a distraction, however; whether there were three rulings in Claudette's favor is not the question. The premarital agreement provision was:

> In the event that either party is required to take legal action to enforce the provisions of this agreement, the non-prevailing party shall be responsible for all attorneys' fees and costs of suit relating to said action.

I ROA 8, 106. The proper question is whether one of the parties was "required to take legal action to enforce the provisions of this agreement."

Claudette simply refuses to address the fact that her Answer and Counterclaim asserted the invalidity of the Agreement, that Charles defended the Agreement as valid, and that the court below

finally so held. AOB at 11-13; RAB at 4-7. Instead she argues that Charles "elongated these proceedings," that he was once held in contempt for non-compliance with a court order, and that he did not get everything he prayed for, and thus he was not the "prevailing party." RAB at 6-7.

In support of her argument, Claudette garbles the citations to two cases, which are actually Fleming v. Fleming, 58 Nev. 179, 72 P.2d 1110 (1937), and Fletcher v. Fletcher, 89 Nev. 540, 516 P.2d 103 (1973), as one case, and claims that it stands for the proposition that "attorney's fees are never mandated or dictated, but are solely within the sound discretion of the Court."[2] RAB at 5.

Claudette is incorrect, primarily because neither case dealt with a premarital agreement. The issue is not discretionary fees under NRS 18.010(2), but fees mandated under an agreement. NRS 18.010(1) provides that: "The compensation of an attorney and counselor for his services is governed by the agreement, express or implied, which is not restrained by law." To make the matter clear, NRS 18.010(5) expressly provides that the discretionary and limiting terms of NRS 18.010(2)-(4) "do not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees."

As Claudette notes, she prevailed on a question of whether certain "property and debt issues" were "covered by the Premarital Contract." RAB at 5. Again, certain rulings of the court below as to matters alleged to be beyond the scope of the premarital agreement are challenged in this appeal. Regardless of the ruling on those issues, however, the core question of whether the

[2] Claudette mis-names and mis-cites another case on the same page, for the same proposition. The intended citation is apparently to Norris v. Norris, 93 Nev. 65, 560 P.2d 149 (1977). That case also is irrelevant, for the reasons stated in the following paragraph; the case merely states that there was no error and cites Fletcher.

premarital agreement was valid was litigated on the face of the pleadings, with Charles defending the agreement as valid, and Claudette attacking it as invalid. 1 ROA 1-4, 12, 163.

Charles was not required to win every argument on every issue under the agreement in order to be the "prevailing party." As this Court has repeatedly held:

> A plaintiff may be considered the prevailing party for attorney's fee purposes if it succeeds on any significant issue in litigation which achieves some of the benefit [it] sought in bringing the suit.

Sack v. Tomlin, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 24, Mar. 30, 1994); Hornwood v. Smith's Food King, 105 Nev. 188, 192, 772 P.2d 1294 (1989). In this case, Charles sought to have the premarital agreement upheld as valid as a limitation to the sums he might otherwise lose in alimony or property upon divorce, and he prevailed. Under the agreement that Claudette's counsel drafted, Charles was entitled to "all attorney's fees and costs of suit relating to" this divorce as a matter of contract.

As an aside, it should be noted that Claudette cites only her attorney's argument as evidence in the record that the agreement required certain rulings in her favor, or that she prevailed on issues under the premarital agreement. RAB at 5-6.[3] In fact, the premarital agreement said nothing about, for example, liability for income taxes during marriage. 1 ROA 6-9. It is also worth noting that Claudette does not even try to defend the trial court's denial of fees to Charles on the lower court's stated ground that Claudette had changed attorneys. AOB at 12.

C. **The Agreement Required Claudette to Pay Charles' Attorney's Fees**

[3] Claudette's citations to the record are difficult to follow. This is apparently because of an error by the Clerk's office, which (according to the information supplied to Appellant) sequentially numbered pages 14 and 15 of the transcript in volume 6 of the record as "1099" and "2000." Charles has attempted to follow the Clerk's numbering.

Again, this point was not directly addressed by Claudette, who (understandably) does not want this Court to focus on the agreement of the parties and the meaning of that agreement. It is submitted that the citations and argument above relating to NRS 18.010(1) should also be referenced in resolving this sub-issue.

II. THE DISTRICT COURT ERRED IN ORDERING CHARLES TO PAY THE SPOUSAL SUPPORT DUE UNDER THE PREMARITAL AGREEMENT DURING THE PENDENCY OF THE CASE, AND TO PAY IT AGAIN AFTER THE CASE WAS OVER.

Instead of addressing the terms of the admittedly-valid and enforceable premarital agreement, Claudette defends the lower court's orders on the basis of Claudette's inferior earning capacity, etc. RAB at 8-10. Of course, it was precisely because those factors might be used to create a spousal support award to Claudette that Charles agreed to a premarital agreement so overtly lopsided in Claudette's favor as to property and other terms. 1 ROA 6-9. None of the matters argued by Claudette are relevant to the issue before this Court -- whether the lower court's order was in violation of the premarital agreement. See RAB at 8-9.

Claudette's second argument requires closer scrutiny. She maintains that Charles' payments on the house for the year of Claudette's exclusive possession were "voluntary" and therefore not part of the sums owed her pursuant to the premarital agreement, and that they were not spousal support, but "to maintain the community property for trial." RAB at 9.

It should be noted in passing that the house in question was transmuted upon marriage from Charles' separate property to community property, while Claudette's separate property house was preserved as her separate property. 1 ROA 6. There is apparently no dispute to Charles' assertion that he paid the mortgage for ten months after moving out of the house, through July,

1993; the question is whether those payments were "spousal support " under the terms of the premarital agreement. 4 ROA 912.

Claudette's flat assertion that "Charles cannot point to anything in the record suggesting the payments were not voluntary," RAB at 9, is remarkable. It is true that not all orders were formally filed, but there is little doubt on this record but that the payments were intended and perceived by all as court-ordered support. As early as November, 1992, Claudette had asked for orders that Charles be forced to make the mortgage payment "due to the large disparity in income." 1 ROA 26, 28. Charles' filing in opposition states his willingness to comply with the spousal support provisions of the premarital agreement **by** paying the house payment for nine months "in lieu of spousal support payments."[4] 1 ROA 76.

The lower court judge stated at the hearing: "Spousal support -- he's been paying the house payment, that should continue." 3 ROA 571. The eventually-entered order from the resulting hearing did not contain a formal order requiring those payments, although the parties agree that the result of the hearing was that Claudette got exclusive possession and Charles made the mortgage payments. 1 ROA 157-59.

On June 11, 1993, Claudette's counsel filed papers requesting of the court below further temporary orders, including: "That the Plaintiff [Charles] make the payments on the marital residence **as heretofore ordered by this Court**." 2 ROA 345A (emphasis added).[5]

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[4] The trial court's decision did note that Charles "voluntarily paid" the mortgage payments. 6 ROA 2129. It is this "volunteering" that the lower court was addressing in the decision. Claudette's position that the payments had nothing to do with Charles' spousal support obligation is simply not credible on this record.

[5] This appears to be another numbering problem from the County Clerk. The reference is to lines 14-15 of the unpaginated page between pages 345 and 346 of volume two of the record.

The attorneys reiterated their understanding of the lower court's order at the resulting hearing in June, 1993. 3 ROA 592. Claudette's attorney reminded the judge that "you had indicated he'll continue to make the payment in lieu of attorney's fees or spousal or anything like that." 3 ROA 592. It is respectfully submitted that it is dissembling for Claudette to assert that the order she benefited from and insisted be maintained cannot be held against her because it was not sufficiently formalized.

Charles, of course, was also aware of the court's directive to make the mortgage payments in lieu of spousal support cash payments, if not because of any file-stamped order. At the June, 1993, hearing, the lower court ordered: "[Charles] shall make the mortgage payment for the month of July which shall be credited to him at the time of sale or transfer." 2 ROA 401. The judge made a point of relieving Charles of his "obligation" to make the payment as of August, 1993. 3 ROA 619.

In short, the court, both lawyers, and both parties knew that Charles was required to make the payments on Claudette's behalf in a sum that exhausted his spousal support obligation under the premarital agreement. Further, since the agreement is stipulated to be valid and it limited Charles' exposure to pay sums for Claudette's benefit, there is no other authority by which such payments could have been compelled than the limited spousal support provisions of the premarital agreement.

It is submitted that the record establishes with fair clarity that these particular mortgage payments by Charles should have been treated as "spousal support" at the end of trial as they had been treated during the earlier phases of the litigation. If there is any question as to how to interpret the intentions of parties to this sort of arrangement, this Court provided guidance in how to resolve it in Sack v. Tomlin, supra.

There, the Court had to determine the relative ownership rights of co-owners to real estate in which one party was residing; the Court re-affirmed the general rule that "where one cotenant is in sole but not adverse possession, the other cotenants are liable for their percentage of mortgage payments. . . . In the absence of . . . ouster by the co-tenant in possession, . . . a tenant is not liable for rent or the use of the premises." Id., 110 Advance Opinion No. 24 at 10. In this case, of course, the possessory co-tenant made none of the payments for the residence. It is respectfully submitted that in this case, Claudette's request for exclusive possession, subsequently granted, constituted both "adverse possession" and an "ouster" sufficient to show that payments by Charles for the mortgage on the property were actually payments to Claudette in satisfaction of his spousal support obligation under the premarital agreement.

For all the reasons set out in the Opening Brief as to this issue, the full $7,920.00 paid by Charles during the pendency of the case should be deducted from his maximum $10,200.00 exposure for spousal support, and the trial court's decree should be reversed on this issue with a specific order to limit Charles' post-decree payments to $2,280.00.

A few ancillary matters require clean up. Speaking of the $200.00 per month limiting Charles' exposure to spousal support for Claudette, she asserts as an aside that the premarital agreement "is silent on how this trust fund related to spousal support, if any [sic]." RAB at 9.

It is submitted that with even a cursory glance at the premarital agreement, it is impossible to conclude anything other than that the $200.00 per month that Charles was supposed to deposit into a trust fund, in the first paragraph of the "SPOUSAL SUPPORT" section of the agreement, was intended as the funding mechanism for that spousal support obligation. 1 ROA 7. It is clear that Charles did not establish that trust fund, but instead had to pay the $200.00 per month out of post-separation (and post-divorce) earnings.

This, of course, was to Claudette's benefit; if he had diverted $200.00 per month during marriage and cohabitation to fund the alimony pool, the parties would not have had, used, and enjoyed those funds during marriage. Since Charles neglected to establish the fund, he had to (and did) pay the money out of post-separation earnings he otherwise could have kept for himself.

It is disturbing that Claudette chose not to address the fact that the decree drafted by her counsel and entered by the district court is contradictory on its face. As noted in the Opening Brief (AOB at 16), the decree both limits the spousal support award to 51 payments in accordance with the Agreement, and restates the award as permanent alimony of $200.00 per month. III ROA 496-97, 503. This must be resolved in any order from this Court, by striking the "permanent" language from the decree.

III. THE DISTRICT COURT ERRED IN FINDING THAT CLAUDETTE HAD ANY INTEREST IN THE FORT APACHE PROPERTY FOR WHICH SHE OBTAINED A MONEY JUDGMENT UPON DIVORCE.

The Opening Brief noted that neither Charles nor Claudette, nor even Charles' separate property business, ever owned the Fort Apache property. AOB at 4-6, 17. Claudette ignores the issue of whether the property was ever owned by the parties completely, but simply states that Charles "forged" her name "after the real property had been placed in joint tenancy." AOB at 11. Unfortunately, Claudette's only citation to the record is to that finding by the district court. 6 ROA 2119. There simply is no evidence in the record, anywhere, that either of the parties ever had an ownership interest in the land. The record is similarly barren of any evidence that of a joint tenancy interest by the two parties together.

The court below fixated on Charles' admitted intention to acquire the property, in the future, as a homesite for the parties, and his intention to obtain it in the future as joint tenancy property

by having it signed over to the parties individually after his company obtained the land. At Claudette's urging, the court below was unable to avoid concluding that Claudette should "get something" from Charles having decided not to obtain the land and not to make a gift to her of an interest in that land.

Again, the problem with the approach and ruling of the lower court was its position that as long as the court was "doing equity," the law was unimportant. AOB at 17-18; 6 ROA 2116. As this Court has recently noted, addressing a similarly-worded ruling by the same judge as to a child support issue:

> Although this court has allowed trial judges to make equitable adjustments to support awards, such equitable adjustments have always been tied to the factors in [the child support statute]. [Citations omitted.] Equitable principles alone are simply insufficient. The district court may use equitable principles in considering a deviation, as long as the deviation is based on one of the factors enumerated in [the statute].

Khaldy v. Khaldy, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 26, Mar. 30, 1995).

Here, no property rights were created or transferred by the transactions shown by the record. Charles' addition of Claudette's signature to the trade-out purchase agreement between Dimick Development and Dr. Valladares was mere surplusage and gave her nothing. VI ROA 2065; Trial Exhibit 1; Sprenger v. Sprenger, 110 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 104, July 26, 1994). Despite the stated wish of the lower court judge to find some monetary significance to the intention to someday hold the property as joint tenants, there simply is none under law. IV ROA 886-87.

Claudette's signature on the "vesting instructions" to the title company likewise had no legal effect. Nowhere in the Answering Brief does Claudette attempt to defend her position that the document somehow "put the house [sic] in joint tenancy" and vested title in Claudette under the

legal doctrines of "forgery and waste." VI ROA 2105. It is respectfully submitted that such authority does not exist, and the absence of authority to defend her position constitutes a confession of error. See State, Emp. Sec. Dep't v. Weber, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority); EDCR 2.21(a).

It is worth noting that Claudette chose not to even address the compellingly similar facts of Sprenger, which was cited in the Opening Brief, as to whether the documents in the record in this case could create a property interest. She cites nothing -- statutory or case law -- saying that either the purchase agreement or the vesting instructions created any legally recognizable property interest in Claudette.

All of this goes to the $18,750.00 awarded to Claudette from her non-existent "interest" in the Fort Apache land, and the $2,000.00 further award to her imposed by the lower court on Charles as a sanction for "fraud." 6 ROA 2129-2130.

The lower court's ruling contains several errors. The "Affirmative action" of signing someone else's name to documents that could create a future ownership interest does not "evidence the community property nature" of anything. No money was actually received by Charles, but value was received by his separate property business, which fact was not considered by the court despite finding the agreement valid that confirmed the business as separate property. The court imposed a $2,000.00 "sanction" on Charles for "fraud" in this transaction without analysis or explanation.

All but the last of these points is explored in the Opening Brief, and not significantly refuted in the Answering Brief. There, Claudette merely recites the Nevada statutory provision barring transfer of real property owned by the community without the written consent of each, NRS 123.230(3), and cites to two out-of-state cases saying that one spouse cannot validly transfer the other spouse's interest in such property. RAB at 12.

All of that is conceded, but the citations are simply irrelevant, as their reference begs the question actually before the Court. Obviously, the transfers in question would not have been valid at all if Claudette had owned a property interest in the Fort Apache property. The fact that the transfers were permissible under NRS 123.230 by itself establishes that there was no community property interest for Claudette to lose.

It is conceded that Charles could not permissibly transfer Claudette's interest without compensation to her if she had an interest. The trial court's duty was to determine as a matter of law whether Claudette had any ownership interest in the land that at one time was going to be acquired in the future by Charles' separate property company.

The record makes it clear that Dimick Development never acquired title to the parcel, but abandoned efforts to obtain it for economic reasons. 4 ROA 854-55, 860, 862, 811-12, 818. There is no evidence in the record at all, nevertheless "clear and convincing" evidence as legally required, that the property was ever transmuted to the community property of Charles and Claudette. See Sprenger v. Sprenger, supra, Advance Opinion at 2-3.

It is submitted that, as a matter of law, there is no wrongful act in failure to transfer property to another when there is no legal duty to transfer that property. There simply was never any ownership interest in the property by Claudette. Thus, she is owed no "compensation" for Charles' non-acquisition of the property, and (as argued below) there was no "fraud" (and can be no legitimate "sanction"). Charles might have given Claudette a half-interest in the Fort Apache property, if he had ever received it, but neither his business decision to cancel the acquisition as a matter of economic necessity, nor his decision not to give her property from his separate property company was a compensable, or sanctionable, act.

As noted above, the question of "fraud" was addressed only briefly in the Opening Brief, and Claudette has not defended the court's finding in the Answering Brief. This Court has not recently reiterated the elements of fraud in the matrimonial context. See, e.g., Carlson v. Carlson, 108 Nev. 358, 832 P.2d 380 (1992) (discussing intrinsic and extrinsic fraud by footnote). Generally, however, "fraud" requires: (1) A false representation by the defendant; (2) Defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) Defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) Plaintiff's justifiable reliance upon the misrepresentation; and (5) Damage to the plaintiff resulting from such reliance. Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 825 P.2d 588 (1992).

It seems clear, without belaboring the point, that facts satisfying these elements simply do not exist in this case. More precisely, the court below ruled that Dimick Construction's non-purchase of the Fort Apache land, and Charles' failure to subsequently transfer it from his separate property company to the parties as joint tenants, somehow constituted a fraudulent conveyance. Nothing in this Court's "fraud" decisions to date have eliminated the elements of that tort, and the trial court cannot simply recite the mantra of "equity" without finding some legal duty that Charles had, and breached, before finding him liable to Claudette for the value of property that she never owned.

It is respectfully submitted that under the facts of this case, Charles had no duty to create any ownership interest in the property for Claudette. So long as anything that was owned was owned by Dimick Development, it was his sole and separate property in accordance with the valid premarital agreement. Charles breached no duty, and Claudette suffered no damages. Further, since she never had such an interest, there was no fraud in any transactions by Charles or Dimick

Development relating to the property, and the lower court erred as a matter of law both by finding fraud and by sanctioning Charles.

IV. THE DISTRICT COURT ERRED IN FAILING TO RESTORE CHARLES' SEPARATE PROPERTY TO HIM, AND IN FAILING TO EXPLAIN ITS DISPROPORTIONATE AWARD OF COMMUNITY PROPERTY.

As a preliminary matter, it should be noted that Claudette has cited no legal authority whatsoever for the proposition that the lower court could summarily dispossess Charles of his pre-marital separate property without lawful authority. Under Weber, supra, the absence of any authority should be treated as a confession of error. In reality, this subject is another instance of the trial court reciting "equity" as a label for violating statute.

Under the law of this state, Charles' premarital personal property remained his throughout the marriage. NRS 123.130. When Claudette admitted retaining Charles' pre-marital separate property, the lower court should have simply ordered that property returned to him. The court did not do so.

The Opening Brief recited the denial to Charles by the court below of his premarital separate property and (despite finding the agreement applicable and binding), his 25% interest in the community property accumulated during marriage in accordance with the premarital agreement. AOB at 21-23.

Claudette does not attempt any legal excuse for this ignoring of Charles' rights under law and under the premarital agreement. Instead, she repeats some of her contradictory rationalizations made below for keeping all the property because Charles behaved badly, and vaguely alludes to the

substantial evidence standard of review, and the ability of the court below to observe demeanor and determine truthfulness.[6] RAB at 14-15.

Appellant has no problem with the rule of substantial evidence, but there is no "factual finding" that is being attacked here, and no disagreement over the facts on appeal. Rather, as with other issues discussed above, the problem is the lower court's refusal to comply with statutory law, and the law of the case (as to validity of the terms of the premarital agreement). The lower court's refusal to comply with law cannot be defended on any evidentiary standard.

Under state law, the court was required to order Charles' premarital property returned to him. Likewise, under the admittedly valid premarital agreement, the jeep belonging to Dimick Development remained the property of that company, and the lower court erred by apparently, silently, using it as an offset to the community property van awarded to Claudette by awarding the van to Claudette (valued at $15,000.00 to $20,000.00) with no share of value to Charles. 1 ROA 6.

The court below was simply not permitted under the premarital agreement to give 100% of the community property personalty to Claudette just because it was convenient, or because she had retained it during the pendency of the case. The distribution below, resulting from selectively ignoring state law and the agreement, requires reversal.

V. CONCLUSION

Nothing in the Answering Brief overcomes the claims of error substantiated in the Opening Brief. The claims made in this appeal are not of "abuse of discretion," but plain legal error.

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[6] Claudette makes a reference to alleged testimony at 4 ROA 837 that says the van was a gift from Charles to Claudette. RAB at 14-15. Counsel is unable to find such a reference in the record. In any event, there was no such finding by the court below.

This Court should reverse the alimony and property terms of the decree, remand for entry of a post-divorce alimony award in keeping with the maximum permitted under the agreement (i.e., $2,280.00), eliminating any purported distribution to Claudette of money for an interest in the Fort Apache property, for legally proper distribution of community property and return of Charles' premarital separate property, and for the determination and entry of an attorney's fee award, in accordance with the agreement, for Charles' expenses below and in this appeal.

Respectfully submitted,
MARSHAL S. WILLICK, ESQ.

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Attorney for Appellant

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